

Claimant suffered compensable injuries on October 1, 1989 to her right shoulder and on November 13, 1991 to her low back. These accidents are stipulated to by the parties.

K.S.A. 1992 Supp. 44-510e(a) states in part:

“Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence.”

As a result of these injuries, claimant was examined and treated by two doctors; Dr. Alan Wedel and Dr. P. Brent Koprivica. Claimant's termination of employment on March 4, 1993 came about as a result of Dr. Wedel's recommendation. He felt claimant should avoid repetitive motion activities, but placed no specific limitations on claimant, deferring to the opinion of the orthopedic surgeon. A portion of Dr. Wedel's concern stems from claimant's injuries to her upper extremities. These conditions are not at issue in this docket, but instead were addressed by the Administrative Law Judge in the Award in Docket No. 183,205, which is not on appeal to the Appeals Board. As such, for purpose of this award, the Appeals Board must separate claimant's shoulder and back conditions from the injuries experienced to claimant's upper extremities. While the medical record makes this somewhat difficult, it does not render it impossible.

Dr. Koprivica, in his evaluation of claimant, diagnosed rotator cuff tendinitis in the right shoulder. He assessed claimant a three percent (3%) whole body functional impairment as a result of this condition. The shoulder impairment stems from the injuries suffered by claimant on October 1, 1989.

Dr. Koprivica further assessed an additional thirteen percent (13%) functional impairment to claimant's back for functional motion loss, ten percent (10%) for loss of flexion, three percent (3%) for loss of lateral flexion, equalling thirteen percent (13%) whole body functional impairment to claimant's back. Dr. Koprivica assessed claimant an additional seven percent (7%) as a result of the bulging disc diagnosed in claimant's low back. In combining the thirteen percent (13%) with the seven percent (7%) Dr. Koprivica concluded that claimant had suffered a nineteen percent (19%) whole body functional impairment as a result of the injuries and limitations suffered to claimant's low back. This functional impairment appears to be separate and distinct from the three percent (3%) assessed claimant's shoulder. As these functional impairments are the only impairments in the record, they are adopted by the Appeals Board as appropriate, being uncontradicted evidence. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Therefore, claimant is awarded a three percent (3%) whole body functional impairment for the injuries suffered to her shoulder for the period October 1, 1989 through March 3, 1993 and a nineteen percent (19%) whole body functional impairment for the injuries suffered to her low back for the period November 13, 1991 through March 3, 1993.

Claimant continued working for respondent through March 3, 1993 with her benefits continuing until September 17, 1993. Claimant alleges entitlement to work disability subsequent to her termination of employment on March 3, 1993. In proceedings under the Workers Compensation Act, the burden of proof is on the claimant to establish an award of compensation by proving the various conditions on which the claimant's right depends by a preponderance of the credible evidence. K.S.A. 44-501 and K.S.A. 44-508(g); See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by the medical evidence presented in the case and has a responsibility of

making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Claimant alleges her entitlement to work disability comes as a result of the low back injury. Claimant argues the right shoulder is a separate and distinct condition entitled to its own award of work disability and should not be combined with the back in a work disability award. The Appeals Board agrees, in part, to claimant's argument. Claimant suffered two separate and distinct injuries. An injury to her shoulder on October 1, 1989 and an injury to her low back on November 13, 1991. Nevertheless, in reviewing the evidence in the record, the medical opinion of Dr. Koprivica appears to combine both claimant's shoulder and low back injuries when deciding what, if any, limitations or restrictions he would place upon claimant's ability to return to work. In dealing with work disability, the Appeals Board is bound by K.S.A. 1992 Supp. 44-510e(a) which states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

The Appeals Board is asked to separate the shoulder and the back for purpose of work disability. The Appeals Board finds that during the overlapping periods of award time involving both claimant's right shoulder and low back, the two injuries cannot be separated. As such, claimant's work disability subsequent to her termination on March 3, 1993, results from a combination of both injuries. The only evidence in the record involving work disability stems from the testimony of Mr. James Molski. Mr. Molski, in utilizing the restrictions of Dr. Koprivica, found claimant to have suffered a seventy percent (70%) loss of ability to perform work in the open labor market and a fifty-one percent (51%) loss of ability to earn comparable wages.

In determining the extent of permanent partial disability, both the reduction of claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. The statute is silent as to how this percentage is to be arrived at. In Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), the Supreme Court indicated that while a balance of the two factors is required, the statute does not specifically state as to how this balance is to occur or what emphasis is to be placed on each of the tests. The Appeals Board finds no compelling reason to place additional emphasis on one test over the other and, as such, weighs each equally. In comparing Mr. Molski's seventy percent (70%) loss of access to the open labor market to the fifty-one percent (51%) loss of ability to earn comparable wages the Appeals Board finds that claimant has suffered a sixty percent (60%) permanent partial work disability as a result of combined injuries to claimant's right shoulder and low back. As both the shoulder and the back injuries contribute to claimant's work disability, the Appeals Board finds that date of claimant's back injury on November 13, 1991, shall be the beginning date for claimant's 415 week for permanent partial general body work disability minus any functional weeks paid as above designated.

The Appeals Board further finds, that for purposes of assessing work disability, the average weekly wage of claimant stemming from the back injury shall be used in the computations subsequent to claimant's termination of employment on March 3, 1993. As claimant was earning this average weekly wage at the time of termination, and as the back injury appears to be the more significant injury of the two this appears to be the most

equitable solution. The Appeals Board, as trier of fact, has the responsibility of making its own determination in this regard and so finds.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson, dated June 16, 1994, shall be, and is hereby, modified.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Mary Abrams, and against the respondent, Rema Bakeware, and its insurance carrier, Travelers Insurance Company for injuries occurring on October 1, 1989 and November 13, 1991, as follows: October 1, 1989, based upon a 3% whole body functional impairment, with an average weekly wage of \$214.79, claimant is entitled to 12 weeks temporary total disability compensation at the rate \$143.20 in the amount of \$1,718.40, followed by 4 weeks temporary partial disability in the amount of \$372.32 (equalling 2.6 weeks temporary total disability compensation) for a total temporary disability award of 14.6 weeks, followed by 163.82 weeks permanent partial disability at the rate of \$4.30 per week in the amount of \$704.43, making a total amount and due owing for the October 1, 1989 injury to claimant's shoulder of \$2,795.15, with the payments to run through March 3, 1993.

For the accident of November 13, 1991, and based upon a 19% whole body impairment, and an average weekly wage of \$340.00, claimant is entitled to 40.71 weeks temporary total disability compensation at the rate of \$226.68, in the sum of \$9,228.14 followed by 27.29 weeks permanent partial general body disability at the rate of \$43.07 per week totalling \$1,175.38, making a total amount due for the period November 13, 1991 through March 3, 1993, of \$10,403.52

For the period March 4, 1993 through September 17, 1993, based upon a 60% whole body work disability and an average weekly wage of \$340.00, claimant is entitled to 28.29 weeks of permanent partial general body disability at the rate of \$136.01 per week in the sum of \$3,847.72. After September 17, 1993, and based upon a 60% whole body work disability and an average weekly wage of \$393.30, claimant is entitled to 318.71 weeks of permanent partial general body disability at the rate of \$157.33, totalling \$50,142.64, for a total award of \$67,189.03.

As of February 1, 1996, there will be due and owing to claimant 12 weeks of temporary total disability compensation at the rate of \$143.20 in the amount \$1,718.40 plus 4 weeks temporary partial disability compensation in the amount of \$372.32, plus 163.82 weeks of permanent partial disability at \$704.43, plus 27.29 weeks permanent partial disability at the rate of \$43.07, in the sum of \$1,175.38, plus 40.71 weeks temporary total disability compensation at the rate of \$226.68 in the sum of \$9,228.14, followed by 28.29 weeks permanent partial disability at the rate of \$136.01 totalling \$3,847.72, followed by 124 weeks permanent partial general body work disability at the rate of \$157.33 in the sum of \$19,508.92, for a total due and owing of \$36,555.31. Thereafter, claimant is entitled to 194.71 weeks permanent partial general body work disability at the rate of \$157.33 in the amount of \$30,633.72 until fully paid or further order of the Director.

Claimant is further awarded future medical expense upon application to and approval by the Director. Claimant is awarded unauthorized medical in the amount of \$350.00 upon presentation of an itemized statement verifying same.

Claimant's contract for attorneys fees is hereby approved insofar as it complies with K.S.A. 44-536 and a lien is placed against the award in favor of claimant's attorney, Jan L. Fisher pursuant to such statute.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Owens, Brake & Associates Transcript of Proceedings Dated December 16, 1993	\$ 74.69
Deposition of Mary Abrams Dated December 16, 1993	\$253.90
Deposition of Dr. Alan Wedel Dated January 7, 1994	\$275.05
Transcript of Proceedings Dated January 10, 1994	\$454.10
Gene Dolginoff Associates Deposition of Dr. P. Brent Koprivica Dated December 30, 1993	\$743.95
Don K. Smith & Associates Deposition of James Molski Dated January 10, 1994	\$570.75

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

Dissent

The undersigned respectfully dissent from the decision of the majority.

The below signed Appeals Board members acknowledge the Workers Compensation Act allows a work disability of 415 weeks for each injury. Beginning claimant's work disability computations with the date of the shoulder injury in October, 1989, would clearly penalize the claimant. On the other hand, a work disability combining both the shoulder and the back with an injury in November, 1991, would clearly penalize the respondent. From our assessment of the evidence the most just method of compensating claimant for the injuries suffered, without unduly penalizing either party, is to grant claimant a three percent (3%) functional impairment to the shoulder, stemming from an October 1, 1989 injury date with an award through March 3, 1993; a nineteen

percent (19%) whole body functional impairment for the injury to the low back on November 13, 1991 through March 3, 1993. Thereafter, claimant would be entitled to a sixty-three percent (63%) whole body work disability for a period to run from March 4, 1993 through September 14, 1997, which is 415 weeks subsequent to claimant's shoulder injury of October 1, 1989. As of that date, the award for claimant's shoulder injury ceases and the award would continue based solely upon the injury suffered to claimant's low back.

It is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence. The testimony of Mr. Molski only supports a combination work disability when combining the restrictions for both the shoulder and the back. The evidence presented by Mr. Molski does not permit the fact finder to separate the shoulder from the back and assess work disabilities separately. Had evidence been presented to clearly separate the two injuries, from a work disability standpoint, the Appeals Board would have been able to award claimant work disability as a result of the injury suffered to her back separate from that of the shoulder. Unfortunately, claimant failed in her burden of proof in this regard. Therefore, subsequent to September 14, 1997, and as a result of the injuries suffered to claimant's back, claimant should be entitled to a functional impairment only. For the period September 15, 1997, through October 27, 1999, the remainder of the 415 weeks, for the injuries suffered to her back on November 13, 1991, claimant would be entitled to a nineteen percent (19%) whole body functional impairment.

It is our opinion that, in awarding claimant work disability, utilizing the date of injury to claimant's back, the majority has provided claimant an excessive award which in effect exceeded 415 weeks. Claimant has failed in her burden of proving the necessary elements to justify the work disability awarded.

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, Kansas
C. Stanley Nelson, Salina, Kansas
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director